

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AGNES J. FULLER and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Canandaigua, NY

*Docket No. 02-1952; Submitted on the Record;
Issued January 8, 2003*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that she sustained a recurrence of total disability beginning January 1983 due to her April 24, 1976 and July 22, 1977 employment injuries.

On April 24, 1976 appellant, then a 31-year-old nursing assistant, filed a claim for a traumatic injury to her low back sustained on that day while attempting to reposition a patient. She underwent a laminectomy and an excision of the disc at L5 on November 8, 1976. Appellant returned to work on March 7, 1977, assigned to a floor where patients required less physical assistance.

On July 23, 1977 appellant filed a claim for a traumatic injury to her low back and right leg sustained on July 22, 1977 when she turned and twisted to prevent a patient from falling.

On June 20, 1978 appellant underwent a laminectomy and excision of the lumbosacral disc.

By letter dated January 10, 1979, the employing establishment stated that, due to appellant's restrictions, it had no alternative positions available to her in nursing.

During a hospitalization from March 13 to 27, 1981 appellant underwent surgery for a recurrent herniated disc at L5.

By decision dated September 1, 1981, the employing establishment removed appellant effective September 25, 1981 on the basis that she had been continuously absent since September 9, 1977. Appellant's application for disability retirement was approved on May 10, 1982.

On June 29, 1982 appellant began working full time in the accounting department at the Canandaigua National Bank.

By decision dated October 12, 1982, the Office of Workers' Compensation Programs found that appellant's work at the bank since June 28, 1982 showed that she was no longer totally disabled. The Office reduced appellant's compensation for loss of wage-earning capacity based upon her actual earnings.

On October 16, 1982 appellant elected to receive benefits under the Civil Service Retirement Act in preference to those under the Federal Employees' Compensation Act. This election was effective June 28, 1982.

In a letter dated March 23, 1999, appellant stated: "I am asking for my case to be reopen[ed] because I understand that I should have been on workers' compensation permanent rolls after I could n[o]t work after being retrained for some other type of work due to my back operations due to my injury of July 22, 1977."

On July 22, 1999 appellant filed a claim for a recurrence of disability due to her July 22, 1977 employment injury. She listed the date and hour of the recurrence as "continuous," and the date she stopped work as January 1983. Appellant stated that she had received an associate degree in accounting since her original injury, that she worked as a loan assistant at the Canandaigua National Bank from July 1982 to January 1983 and that she had been unable to work since then.

Appellant submitted a report dated June 4, 1999 from Dr. Deborah Healy, an internist and psychiatrist, who stated that appellant's status should be changed "to permanent disability as this patient is unable to function adequately in order to maintain any kind of part-time employment. Since her back injury in 1976 as a geriatric nursing assistant, she has undergone three spinal surgeries which have resulted in severe osteoarthritis that has developed in both the cervical spine and the lumbar spine. She is in severe constant pain on a daily basis."

By letter dated October 22, 1999, the Office advised appellant that it needed a description of her duties and her physical condition after she returned to work, and an explanation of why she believed her current condition was related to the original injury. The Office also requested medical records of all treatment she received for her back since 1983 and a narrative medical report from her physician including a history, detailed description of findings, diagnosis and the physician's opinion, with supporting explanation, as to the causal relationship between her current disability and the original injury.

By letter dated November 15, 1999, appellant stated that, after she received her degree in accounting, she tried to work at a local bank but she was very limited in sitting and standing. She stated that she lifted boxes of files weighing more than 10 pounds, that this activity and the sitting and standing in this job resulted in increased back and leg pain and that after six months she could no longer do the job.

Appellant submitted a November 15, 1999 report from Dr. Healy, who noted that appellant had many medical conditions in addition to the "severe lumbar spine osteoarthritis that is a result of a back injury and several surgeries that she had for this back injury dating from 1976 to 1981.... Unfortunately the back surgeries were not helpful, and the patient became completely disabled, and since then from the injury, she has developed lumbar spine osteoarthritis, completely disabling her."

By decision dated May 11, 2000, the Office denied appellant's claim. The Office stated:

"[A]t the time you elected to receive benefits from the Office of Personnel Management effective June 28, 1982, the medical evidence of record indicated that you were capable of working in a limited[-]duty assignment. In addition, the medical evidence from Dr. Healy did not provide a rationalized medical opinion based upon objective findings as to why you are unable to work a limited[-]duty assignment. Also, in the report submitted, Dr. Healy did not explain the impact the other conditions, if any, had upon your inability to return to work."

By letter dated May 25, 2000, appellant requested a hearing. She submitted a July 18, 2000 report from Dr. Healy, who noted appellant's back surgeries in 1978 and 1981. Dr. Healy stated:

"These surgeries were helpful to the patient and allowed her to ultimately return to work in 1981 performing light[-]duty tasks as a clerical worker. Unfortunately the area of concern L4-5 of the lumbar spine degenerated further as a result of her injury and surgeries causing significant pain and causing her to be unable to sit for any prolonged amount of time in a clerical or light[-]duty position. Therefore in 1983 she was no longer able to work and was permanently disabled as a result of her original injury on July 22, 1977.

"She has not worked since that time and has had progressive lumbar degeneration with an acute exacerbation recently approximately in April 2000 to the point where she has severe pain requiring multiple analgesic drugs including narcotics with only minimal control and a significant left lower extremity radiculopathy with a positive straight leg raising sign on the left and also no knee jerk by reflex on the left which is new.

"A recent MRI of the lower LS spine which was done on July 3, 2000 showed that the area of original injury from 1977 demonstrated moderate central canal narrowing at L4-5 secondary to hypertrophic change and ligamentum flavum hypertrophy and associated mild bulging disc material. There was anterolisthesis of L4 and L5 as well. The central canal narrowing at L4 and L5 is likely the underlying cause for her acute exacerbation now but this is clearly a result of the original injury which was in the same area back in 1977.

"In my opinion she is permanently disabled from her original injury in 1977 and has been since 1983."

In a report dated July 18, 2000, Dr. Richard A. Stea, a Board-certified neurosurgeon, stated that appellant "developed the current symptoms" after her second injury at work, that her "symptoms were stable in retirement until this May, when without any provocation her left leg pain began again," and that x-rays revealed Grade I spondylolisthesis on a degenerative basis at L4-5. In a report dated October 5, 2000, Dr. Stea recommended a fusion at L4-5.

An Office medical adviser reviewed the medical evidence on November 29, 2000 and stated that "the proposed surgery is related to and meant to correct symptoms not resolved by the previous surgery, which was approved as work related."

By letter dated December 15, 2000, the Office authorized a lumbar fusion at L4-5. Dr. Stea performed this surgery on February 21, 2001.

On March 12, 2001 appellant elected to receive benefits under the Federal Employees' Compensation Act in preference to benefits under the Civil Service Retirement Act effective February 25, 2001. The Office began payment of compensation for temporary total disability on February 25, 2001.

At a hearing held on January 29, 2001 appellant testified that she still had back pain when she started working at a bank in June 1982 and described her work activities in this job, stating that most involved sitting. Appellant also testified that she stopped this job because of too much pain and that she had not received any orthopedic care from 1983 to 1999.

Appellant submitted a report from Dr. Healy dated March 19, 2001, who stated:

"I have had the opportunity to review the records related to the three surgeries done in 1976, 1978 and 1981. The last surgery in 1981 was a right hemilaminectomy with removal of a herniated disc. From review of the notes, the patient initially did well until about six months after that surgery in August 1981 when she developed recurrence of her symptoms with radicular pain radiating down the right lower extremity and the symptoms recurred even while she continued to go to work at her bank teller position. She persisted in working until January 1983, when the level of pain became intolerable and she was no longer able to work. Given the reports reviewed and the patient's clinical history, it is probable that her work environment with prolonged standing and prolonged sitting exacerbated her previous back injury that was related to her workers' compensation injury. This has resulted in chronic problems for the patient including the development of L4-5 spondylolisthesis and severe pain requiring high doses of narcotics to control it."

By decision dated July 5, 2001, an Office hearing representative found:

"Though Dr. Helay related the claimant's degenerative spine condition to the employment injury, she did not treat the claimant until February 1999 and had no knowledge of her condition when she stopped working in 1983. She noted she reviewed surgery records from 1976 to 1981. However, she made no mention of having reviewed any medical records from 1983 to 1999 and made no comment as to whether there was any material change of the injury-related condition at the time the claimant stopped working. The medical evidence therefore fails to demonstrate a change in the nature and extent of the injury-related condition and the claimant has failed to meet her burden of proof to establish a modification of the previous wage-earning capacity determination."

By letter dated March 5, 2002, appellant requested reconsideration, contending that a material change in her medical condition -- a significant increase in her back pain -- caused her to leave her clerk job at the bank in 1983. She submitted a March 2, 2002 report from Dr. Healy, who stated:

"I went back and further reviewed the voluminous records I had and found records from the patient's primary care physician, dated from the period of 1983

to 1999, which were from the Canandaigua Medical Group. It was in those records, that there was documentation of multiple office visits during that time period where the patient had complained of severe low back pain secondary to her previous injury with various studies and treatments recommended to further evaluate it. Treatments, unfortunately, were not effective. It is clear that the injury-related condition persisted during the time period of 1983 to 1999 based on the medical record review.

“It is also clear that the patient’s degenerative spine condition is related to her original injury while she was employed in 1976. Additionally from review of her records, discussions with the patient and the nature of her injury and treatment prior to 1983, it is clear that her back injury, pain and disability became significantly worse causing her to have to leave employment again.”

By decision dated June 21, 2002, the Office found:

“A review of Dr. Healy’s report of March 2, 2002 does not provide objective evidence of a change in the nature and extent of your injury-related condition. The report overviews the fact that your voluminous medical records were reviewed. The Office does not dispute the fact that you continued to have residual effects of your injury-related disability during the years from 1983 to 1999. This is evidenced by the fact that we have continued to provide medical coverage benefits resulting from your July 1977 injury. However, for you to support that you sustained a recurrence of injury, as alleged, the *objective medical evidence* must support that you experienced a change in the nature and extent of your injury-related condition.

“As noted above, the mere finding of pain or discomfort does not meet the requirement of providing objective medical evidence of a change in the nature and extent of your injury-related disability.” (Emphasis in the original.)

The Board finds that appellant has not established that she sustained a recurrence of total disability beginning January 1983 due to her April 24, 1976 and July 22, 1977 employment injuries.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹

The case record contains no medical reports dated after an October 14, 1981 report of appellant’s work tolerance limitations from her attending physician at the time, Dr. Edward P. O’Hanlon, until Dr. Healy’s June 4, 1999 report. At appellant’s January 29, 2001 hearing, her

¹ Terry R. Hedman, 38 ECAB 222 (1986).

attorney testified that Dr. O'Hanlon and another doctor that appellant was treated by between 1983 and 1999 had retired, and that he had been unable to obtain their records.

While pain due to an employment-related condition can be the basis for payment of compensation, the Board finds that Dr. Healy's report consists of the physician's repetition of the employee's complaint that she hurt too much to work.² This is the essence of Dr. Healy's reports: that appellant told her that she stopped working in January 1983 because she hurt too much to continue. Dr. Healy, in her most recent report, stated that she had reviewed medical reports of multiple doctor's visits during the period from 1983 to 1999, but did not indicate what those reports showed other than appellant's complaints of severe pain, which she has had since her employment injuries. Without an explanation of how the nature and extent of appellant's employment-related condition changed in January 1983 so that she could no longer perform the job she had performed for the previous six months, appellant has not met her burden of proof to establish a recurrence of disability.

The June 21, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 8, 2003

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

² See *Paul D. Weiss*, 36 ECAB 720 (1985); *Odeen Wilson Adams*, 33 ECAB 1237 (1983); *John L. Clark*, 32 ECAB 1618 (1981).